(1)

93-2

Supreme Court, U.S.
FILED
JUN 16 1993
OFFICE OF THE CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1992

UNITED STATES OF AMERICA,

Respondent,

v.

LANDEN MAX DULA and
ACCRABOND CORPORATION,

Petitioners.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Steven E. Farese
Counsel of Record
Anthony L. Farese
Farese, Farese & Farese
Post Office Box 98
Ashland, Mississippi 38603
(601) 224-6211

Attorneys for the Petitioners

10 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the prosecutor violate Petitioner Dula's fifth amendment right not to testify by commenting in closing argument to the jury, after Dula elected not to testify, that no one appeared on the stand to testify regarding the legal dispute between Dula and a former supplier, which the defense contended had in bad faith instigated the criminal investigation against Dula and Accrabond?

2. Did the trial court err in permitting the introduction of evidence of alleged prior bad acts committed by Petitioners Dula and Accrabond under Rule 404(b) of the Federal Rules of Evidence?

3. Was the evidence insufficient to support the convictions of the Petitioners because the government failed to produce adequate evidence to prove that the Petitioners had the intent to defraud?

4. Did the district court err in concluding that the weight of the evidence supported the convictions?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW . . .	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	5
ARGUMENT	
I. THE PROSECUTOR VIOLATED THE FIFTH AMENDMENT RIGHTS OF DEFENDANT DULA BY COMMENTING ON HIS FAILURE TO TESTIFY	26
II. THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF EVIDENCE OF ALLEGED PRIOR BAD ACTS COMMITTED BY DULA AND ACCRABOND UNDER RULE 404(B) OF THE FEDERAL RULES OF EVIDENCE	32

TABLE OF CONTENTS (CONT'D)

		Page
III.	THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS OF THE PETITIONERS BECAUSE THE GOVERNMENT FAILED TO PRODUCE ADEQUATE EVIDENCE TO PROVE THAT THE PETITIONERS HAD THE INTENT TO DEFRAUD	38
IV.	THE TRIAL COURT ERRED IN RULING THAT THE WEIGHT OF THE EVIDENCE SUPPORTED THE CONVICTIONS	42
CONCLUSION		43
APPENDIX		

TABLE OF AUTHORITIES

Cases	Page
Brady v. Maryland, 373 U.S. 83 (1963)	6
Griffin v. California, 380 U.S. 609 (1965)	26
United States v. Beechum, 582 F.2d 898 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979)	34, 35
United States v. Borchardt, 809 F.2d 1115 (5th Cir. 1987)	26
United States v. Dothard, 666 F.2d 498 (11th Cir. 1982)	35
United States v. Enzor, 820 F.2d 684 (5th Cir. 1987)	37
United States v. Harbin, 601 F.2d 773 (5th Cir. 1979)	27
United States v. Lavelle, 751 F.2d 1266 (D.C. Cir.), cert. denied, 474 U.S. 817 (1985)	34
United States v. Morales, 902 F.2d 604 (7th Cir.), amended, 910 F.2d 467 (7th Cir. 1990)	42

TABLE OF AUTHORITIES (CONT'D)

Cases — Page

United States v. Pecora, 693 F.2d 421 (5th Cir. 1982) 40

United States v. Sardelli, 813 F.2d 654 (5th Cir. 1987) . . . 28, 35

United States v. Shaw, 555 F.2d 1295 (5th Cir. 1977) 39

United States v. Shively, 927 F.2d 804 (5th Cir.), cert. denied, 111 S. Ct. 2806 (1991) 39, 40

United States v. Smith, 890 F.2d 711 (5th Cir. 1989) 27

United States v. St. Gelais, 952 F.2d 90 (5th Cir. 1992) 41

United States v. Wiley, 846 F.2d 150 (2d Cir. 1988) 36

Williams v. Lane, 826 F.2d 654 (7th Cir. 1987) 29, 31

Statutes

18 U.S.C. § 1001 . . . . . 2, 5, 35

18 U.S.C. § 1341 . . . . . 2, 5, 38

TABLE OF AUTHORITIES (CONT'D)

Statutes	Page
18 U.S.C. § 1343	3, 5, 40
28 U.S.C. § 1254	1
28 U.S.C. § 2255	6
Fed. R. Evid. 403	33
Fed. R. Evid. 404(B)	33

OPINIONS BELOW

The Petitioners were convicted after a trial by jury on December 12, 1991. The convictions were affirmed by the United States Court of Appeals for the Fifth Circuit in an opinion issued on April 16, 1993, which is set forth in the Appendix at A-1.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The final disposition of this case below was the Fifth Circuit's decision affirming the convictions of the Petitioners, issued on April 16, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fifth amendment to the United States Constitution states in pertinent part:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

18 U.S.C. § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be

such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343 states:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be

> fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Federal Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial

> if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

STATEMENT OF THE CASE

Proceedings Below

The Petitioners, Landen Max Dula and Accrabond Corporation, were accused in a 32-count indictment dated May 16, 1991, of various acts of fraud, mail fraud, and wire fraud in violation of 18 U.S.C. §§ 1001, 1341, and 1343. Dula and Accrabond were tried in a jury trial in the United States District Court for the Northern District of Mississippi, Western Division, the Honorable Neal B. Biggers, Jr., presiding, on December 2 to 12, 1991. Dula was acquitted on the majority of counts, but was convicted on counts 11, 12, 13, 19, 20, 25, 26, 29, 30, 31, and 32. Accrabond was acquitted on count 1

but was convicted on counts 2 to 32. In an order entered on February 21, Dula was sentenced to a term of imprisonment of 36 months on each count, to be served concurrently, plus a fine of $27,500. Accrabond received a sentence of a fine in the amount of $248,000 and was required to pay restitution in the amount of $8,238.32. On appeal, the Fifth Circuit affirmed the convictions, but did not address the issue raised by Dula that the government had violated his due process rights under Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence (App. at A-1). The court of appeals ruled that an adequate record had not been developed on this issue, and directed the Petitioners to file a motion to set aside their sentence pursuant to 28 U.S.C. § 2255.

Statement of Facts

Accrabond Corporation is a Tennessee company with offices located in Olive Branch, Mississippi, which is in the business of distributing adhesives, sealants, and glues to aerospace manufacturers across the country. Landen Max Dula is the owner and president of Accrabond. The indictment against Dula and Accrabond alleged that in the period between January 1988 and September 1989, Accrabond engaged in a scheme which was intended to defraud its customers by secretly substituting inferior products for those ordered by the customers. More specifically, the government alleged that on numerous occasions Accrabond acquired stale or expired products, altered and repackaged them, and sold them as new materials. In addition, the government claimed that Accrabond fraudulently sent

products manufactured by a different company than the products ordered, and created new labels to disguise what was being sent. As part of this scheme, the government alleged, Accrabond issued false certificates of compliance regarding the materials it sold.

At trial the government introduced evidence concerning transactions with thirteen manufacturers: General Dynamics, Fas-Tronics, Metricase Corp., Beech Aerospace Services, TACA International Airlines, Beckett Enterprises, Jet Fleet Corp., Aircraft Supplies, DME Corporation, Simmons Airlines, Tracor Aerospace, LTV Aerospace and Defense Company, and Martin-Marietta. In attempting to prove its allegations, the government presented 33 witnesses, including present and former employees of Accrabond and various representatives of the manufacturers that

were allegedly defrauded. The government's primary witness was Mary Lee, an employee of Accrabond for 17 years who currently acts as office manager for the company. Lee testified that during the period alleged in the indictment, Accrabond was a company which was growing rapidly and experiencing greatly increased sales. At one point, Lee estimated that Accrabond received 20,000 orders per year. Lee testified that Dula had tried to create an atmosphere in which Accrabond employees were to please their customers and correct any mistakes which they might make.

Lee described in great detail the process by which Accrabond received orders, produced computer-generated work orders, invoices, and packing slips, filled and packed the orders, and sent orders to customers. Essentially, the

process consisted of telephone orders or faxed orders taken down in handwriting by Lee and other personnel at Accrabond. These handwritten notes were then entered into Accrabond's computer by data entry clerks, which then immediately created a sales copy, work order, and packing slip. After the order was filled, an invoice would be generated and sent.

The prosecutor took Lee through the series of orders that comprised the 32 counts of the indictment in order to attempt to demonstrate that fraudulent substitutions were made in the orders. With regard to the allegation in count 1, concerning a General Dynamics order dated January 19, 1988, Lee testified that a request for a product called Proseal 870 A-1/2, which met military specification 81733, came in by telephone. Lee transferred her handwritten notes to an order

pad, which was then entered into the computer. Lee explained that the computerized order form contained a blank for notations regarding the order, and that based on what had been supplied earlier to General Dynamics for the same type of order, the computer printed out a notation that Accrabond had previously shipped a different product called GC 450 A-2. Lee explained that GC 450 A-2, manufactured by Goal Chemical, was an alternative product cross-referenced by the United States Government as being an equal product, with the exception being the amount of time one could work with the material. Lee could not recall specifically if she had discussed the alternate product with General Dynamics' buying agent, Keith Cartwright, with regard to this particular order, but stated that discussing alternate products informally

was very common. In answer to the question of why the Proseal product appeared on the label, Lee explained that it was on the computer that way from the order and Accrabond occasionally left the originally requested item on the label so that the receiving departments of the customers could process the material without difficulty. In other words, the companies often were structured so that buyers would agree to accept alternative products but it was so difficult to get the company to change the paperwork to accept the alternative that the product was simply sent as the originally ordered item. The government later introduced testimony from officials of General Dynamics named Shepherd Barnett and Paul Gradowski, who each testified that Accrabond was a good supplier and that they had no information that any products

shipped by Accrabond had caused any problems. While these officials each indicated that it was not a policy of their company to accept alternative products, the specifics of the order at issue could not be discussed with certainty because the General Dynamics buyer, Keith Cartwright, had suffered a stroke and was unavailable for testimony.

Lee's testimony with regard to the other orders at issue was essentially the same. Lee next discussed an order from Fas-Tronics for RTV 3145 in gray, a Dow-Corning product. On the order form prepared by the computer, the notation stated, "send actual 3145 gray or see LMD for color on Mobay 400 neutral." Lee explained that the order was a rush order and stated that she assumed that she cleared the possibility of sending an alternative product with the Fas-Tronics

buyer. The government produced no evidence that the Dow-Corning product was not actually sent, and the buyer for Fas-Tronics, William Hutchins, testified that he had no knowledge that his company had received anything other than the originally ordered material. Similarly, an official of Barber-Coleman, the company to which Fas-Tronics had sold the material, testified that there was nothing to indicate that the LTV 3145 was not the product they received. Hutchins also stated that his company continued to do business with Accrabond up to the present.

Lee also testified as to the circumstances underlying the orders from Metricase, Beech Aerospace, TACA International Airlines, Beckett Enterprises, Jet Fleet, Aircraft Supplies, Simmons Airline, Martin-Marietta, DME Corporation, Tracor, and LTV Aerospace. Officials from these

companies also testified as to the orders and materials subsequently received. In each case, these officials conceded that they could not be sure that they received a substitute or alternative product, and in each case there were no complaints that could be attributed to the substitution of one product for another. While some company officials identified problems with materials received by Accrabond, such as Leroy Hixon from Beckett Enterprises and Rodney Crosby of Beech Aerospace, these officials had no information that the products which did not perform as expected were anything other than what they ordered. Several witnesses testified that their products made with material sent by Accrabond had performed well, such as Patrick McLaughlin, a procurement specialist with GTE, which had obtained component parts from DME

Corporation for military products used in the Gulf War. A Martin-Marietta procurement official, Larry Thompson, testified that his company could indeed accept an alternative product if it met the military specification for the product ordered, as long as that product was approved by the company's program engineering department, and Sherwin LeFranc of TACA International Airlines testified that he might well have discussed a substitute product in connection with his order.

Lee further explained that Accrabond was engaged in a lengthy legal dispute with Products Research Chemical (PRC), the manufacturer of several of the products which it distributed. As Lee stated, Accrabond distributed PRC products for eight years in the geographic area around Mississippi and became such a

successful distributor that PRC sought to terminate the relationship and distribute its products directly to the companies which Accrabond had cultivated as customers. Accrabond was able to sell to these nearby companies at a lower cost than PRC was charging because of its low overhead and convenient location. When PRC did terminate the distributorship, Accrabond protested and a lawsuit ensued.

The government also relied on testimony from numerous former employees of Accrabond in its attempt to establish its case. The jury heard testimony from employees who held a variety of positions ranging from vice president to clerk. Callie Hudson, an employee from 1986 to 1989, testified that she took several of the orders alleged in the indictment, and initially testified that she was told by Mary Lee and Max Dula to indicate to the

manufacturing department when products should be substituted. On cross-examination, however, Hudson conceded that she just assumed that Dula knew of the practice of sending substitutions and did not have any direct evidence to this effect. Hudson also stated that she was unsatisfied at Accrabond because she did not get pay raises she believed she should get.

Thomas Holmes, an administrative assistant from 1985 to 1988, testified that there was a practice of substitution at the company, and as examples of disreputable practices at Accrabond testified that the company had received expired and waste products from John Shelley Company and Martin-Marietta, and repackaged and sold them as new products. When presented with documents from these companies on cross-examination, however, Holmes conceded that he had simply as-

sumed that the products were all expired and waste products, but in fact the products were really surplus products or, in the case of John Shelley Company, were fresh products which Accrabond could not buy from the manufacturer because of a legal dispute. Holmes further testified that he could not recall a single time when Dula told him to send out an expired item.

Carol Boyd Hayes, an employee from 1987 to 1990, repeated the assertion that Accrabond sent out expired material acquired from Martin-Marietta, as did John Cooper. However, the evidence established that the Martin-Marietta material was in fact mostly surplus material which was given to Accrabond only because Martin-Marietta had no use for it, not because it was defective or outdated. This was shown by the testimony of Richard

Lewis, the Accrabond employee who arranged for the transfer of the Martin-Marietta material, and by John Taylor, an engineer at Martin-Marietta. Chandler Shelley, head of John Shelley Company, testified that his company sent PRC material to Accrabond after removing the expiration dates and lot numbers, and that this alteration to the label was made not because the material was bad or expired, but in order to protect its distributorship from retaliation by PRC, which refused to permit Accrabond to handle its products because of an ongoing legal dispute concerning Accrabond's distribution of PRC products.

Other employees who testified as to a pattern of substitution of products included Richard Lewis, who developed the computer program used to handle orders and shipments. It was Lewis who created

the system by which blind notes could be placed on the order forms and not appear on the invoices sent to customers. Lewis testified that Dula directed that substitution of products be made, and that false certificates of compliance were sent out. Lewis also identified a logbook in which substitutions on particular orders were recorded. The entries in this logbook ended the day Lewis left the company. Prior statements of Lewis to investigators revealed that Lewis told the investigators that the logbook would convict Dula. Lewis conceded that, after leaving Accrabond, he worked in violation of his contractual covenant not to compete with Accrabond. John Cooper, a sales representative at Accrabond between 1987 and 1989, claimed that he consulted Dula on all orders and that substitutions were made 30-40% of the time. On cross-

examination, however, Cooper acknowledged that he had filed a Qui Tam lawsuit against Accrabond and Dula, hoping to get a percentage of any funds recovered from a fraud prosecution of Dula. In addition, Cooper admitted lying on his application for unemployment compensation by stating that he was fired when in fact he simply walked off the job without telling anyone. Other Accrabond employees testified about the logbook, but no one could explain why it was not kept after Lewis left. The credibility of these employees was put into question by evidence that they either filed Qui Tam lawsuits, and thus had a financial interest in the conviction of Dula and Accrabond, or had other conflicts with Dula.

The government's witness concerning military specifications and whether al-

ternative products would meet those specifications was Philip House, a retired employee of the Air Force. On cross-examination, House admitted that he currently works for Morton International, a sealant company that is the chief supplier of PRC. In fact, when House retired from the Air Force, PRC threw a retirement party in his honor. House acknowledged that he concealed from the grand jury the truth about his employment with Morton International when he testified on behalf of the government. House stated that he did no tests to determine the validity of his conclusions regarding alleged Accrabond substitutions.

At the close of the government's evidence, defense counsel made a motion for judgment of acquittal which was denied by the trial judge. The evidence put on by the defense consisted of the

testimony of two Accrabond employees, Felicia Williams and Donna Beesinger, who stated that Dula did not have an active role in the ongoing activities at Accrabond and did not discuss any policy of substitution with them.

The closing argument of defense counsel emphasized the extremely circumstantial nature of the government's evidence, with the only witnesses who testified as to Dula's involvement in secret substitutions being those who had economic or other motives for attacking Dula. Defense counsel reminded the jury that there was no direct evidence from the customers of Accrabond that they had received substituted products, and no evidence demonstrated that anything sent by Accrabond was faulty or inadequate because it was substituted material. In the government's closing statement, the

prosecutor refuted the contention that no Accrabond product was faulty, stating that there was no way to test this claim since the materials had already been applied to products made by Accrabond customers. The prosecutor specifically refuted the argument of defense counsel that the government's expert, Philip House, could have tested Accrabond products by saying that there was no way to test the products. In response to the evidence concerning the ongoing legal dispute between PRC and Accrabond, the prosecutor also told the jury that "[t]here's been nobody on this witness stand that really knows about what happened between PRC and Accrabond Corporation" (Tr. at 1784). Defense counsel immediately objected that this statement was a comment about Dula's decision not to testify, but the objection was over-

ruled without either a caution to the prosecutor or an instruction to the jury.

ARGUMENT

I. THE PROSECUTOR VIOLATED THE FIFTH AMENDMENT RIGHTS OF DEFENDANT DULA BY COMMENTING ON HIS FAILURE TO TESTIFY.

The fifth amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify. Griffin v. California, 380 U.S. 609 (1965); United States v. Borchardt, 809 F.2d 1115 (5th Cir. 1987). In deciding whether a comment made by the government in its closing argument is a comment against the defendant's failure to testify, a court must determine if "it can be said that the prosecutor's manifest intention was to comment upon the accused's failure to testify [or] was . . . of such character that the jury would

naturally and necessarily take it to be a comment on the failure of the accused to testify." United States v. Smith, 890 F.2d 711, 717 (5th Cir. 1989). Oblique comments on a defendant's failure to testify, if sufficiently suggestive, can be as pernicious and as unlawful as direct comments. United States v. Harbin, 601 F.2d 773, 777 (5th Cir. 1979).

In this case, the statement made by the prosecutor in his closing argument can only be characterized as one intended to draw attention to the decision of Dula not to testify. In referring to the legal dispute between Dula and PRC, which was described by Mary Lee, the prosecutor stated that "[t]here's been nobody on this witness stand that really knows about what happened between PRC and Accrabond Corporation" (Tr. at 1784). Defense counsel made an immediate objection

and moved for a mistrial, but this request was denied without even a cautionary instruction to the jury. The clear effect of the statement was to direct the jury's attention to the fact that Dula, who would be the person that the jury would assume knew about the details of the dispute between Accrabond and PRC, did not choose to explain his story. Consequently, the jury could easily have drawn an adverse conclusion from the prosecutor's statement that contributed to his conviction, particularly in light of the fact that the court did not even caution the jury that the prosecutor's statement was improper.

In a similar case, the Fifth Circuit reversed the governmental fraud conviction of the defendant in United States v. Sardelli, 813 F.2d 654, 657 (5th Cir. 1987), in part because the prosecutor

told the jury in his final argument that defense counsel did not "want the whole thing brought out to you." Although this statement was made in response to defense counsel's statement that the defense had called no witnesses because of the weaknesses in the government's case, the court concluded that the prosecutor's statement was prejudicial, emphasizing that in the context of that particular case the prosecutor could only have been referring to the defendant in his comment, since he was the most knowledgeable witness.

In Williams v. Lane, 826 F.2d 654 (7th Cir. 1987), the court granted a habeas corpus petition in a rape case in which the prosecutor had made a statement that was construed to be a comment on the defendant's failure to testify. The defense had argued that the victim had con-

sented because she and the defendant had known each other socially prior to the alleged rape. In response, the prosecutor stated: "Who got up on this witness stand and told you these two were dating?" Id. at 665. The court concluded:

> [T]his Court has previously recognized that closing arguments regarding uncontradicted testimony which could have been rebutted by either the defendant or another witness are nonetheless impermissible because they "could have called attention to [the defendant's] failure to testify on any issue--and thus to his failure to contradict much of the testimony which could not have been contradicted by anyone but him." United States v. Poole, 379 F.2d at 649 (quoted in Burke, 756 F.2d at 1301, and Buege, 578 F.2d at 189 n. 1).
>
> . . . .
>
> The prosecutor's indirect references to petitioner's failure to testify were clearly improper and violated the Fifth Amendment. As in Burke, the comments were "likely to cause the jury to view the closing argument as a commentary on the defend-

> ant's failure to testify and as a suggestion to view that failure to testify as indicia of guilt." 756 F.2d at 1302.

Id.

The words found to be prejudicial in Williams v. Lane, supra, are very similar to those at issue in this case. In view of the dearth of evidence regarding Dula's alleged intent to defraud, see Arguments III and IV, infra, the prejudice resulting from the prosecutor's comment can only be deemed to have had an impact on the decision of the jury to convict Dula and Accrabond. Accordingly, both Dula and Accrabond are entitled to a new trial based on this trial error.

II. THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF EVIDENCE OF ALLEGED PRIOR BAD ACTS COMMITTED BY DULA AND ACCRABOND UNDER RULE 404(b) OF THE FEDERAL RULES OF EVIDENCE.

During the course of testimony from Rick Drexler, laboratory manager at Accrabond during the time period at issue in this case, the government was permitted to elicit testimony concerning a sale of materials to Pan Metals, a Korean corporation. Over objection from defense counsel, Drexler told the jury that Pan Metals had ordered a Dow-Corning adhesive but had been sent a substitute product made by General Electric that was in stock. Drexler further stated that "it did not get by," meaning that the substitution was noticed by Pan Metals. This transaction was not among those alleged in the indictment.

Rule 404(b) of the Federal Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

In addition, Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Taken together, these rules form a two-part test for determining the propriety of admitting evidence of "bad acts" not

alleged in the indictment. As stated in United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979):

> First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403.

(Footnote omitted.) Of course, the danger of admitting evidence of other crimes or bad acts is that the jury may convict on a basis other than what has been alleged in the indictment. Generally speaking, the similarity of other bad acts evidence to the charged offenses increases the danger the jury will confuse the issues necessary to convict the defendant. United States v. Lavelle, 751 F.2d 1266 (D.C. Cir.), cert. denied, 474 U.S. 817 (1985).

A number of courts have utilized the two-part Beechum test to conclude that defendants have been unfairly prejudiced by the admission of other bad acts evidence. For example, in United States v. Dothard, 666 F.2d 498 (11th Cir. 1982), the defendant was charged with violating 18 U.S.C. § 1001 by willfully making a false statement on an Army enlistment application. At trial, the government introduced evidence that the defendant had previously made a false statement on a driver's license application. The court concluded that even if the fact that the defendant had lied on both applications was probative of some intent to deceive with regard to the crime charged, the probative value of the evidence was far outweighed by its prejudicial impact.

The same conclusion was reached in United States v. Sardelli, supra, in

which the court criticized the government prosecutor for introducing an indictment containing dismissed charges into evidence at the defendant's trial for making false statements in a loan application. Similarly, in United States v. Wiley, 846 F.2d 150 (2d Cir. 1988), a prosecution for mail and wire fraud, the court found error in the fact that the trial court permitted the introduction into evidence of an earlier state court order which showed that the defendants had made fraudulent statements in connection with a business deal. While the court order was in fact relevant to an issue at trial because it was probative on the issue of whether a particular codefendant had knowingly lied when he told one person that another defendant was an honest man who had never cheated anyone, the court found that the statement was unduly

prejudicial under Rule 403. As the court noted, the risk that the jury would believe that the defendant had a propensity to engage in fraudulent schemes outweighed the probative value of the evidence. See also United States v. Enzor, 820 F.2d 684 (5th Cir. 1987) (extrinsic offense testimony of postal inspector concerning money-order violations at prison where defendant was inmate was not relevant to defendant's prosecution for falsely altering money orders, was highly prejudicial, and denied defendant his right to a fair trial).

As these cases show, the admission of testimony concerning a supposedly fraudulent transaction not alleged in the indictment was unfairly prejudicial to Dula and Accrabond. This conclusion is particularly mandated by the fact that the Pan Metals evidence purported to show

that materials were substituted and not accepted, something that was not shown by any other evidence introduced by the government. Because of the unfairly prejudicial nature of this evidence, Dula and Accrabond were denied their right to a fair trial.

III. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS OF THE PETITIONERS BECAUSE THE GOVERNMENT FAILED TO PRODUCE ADEQUATE EVIDENCE TO PROVE THAT THE PETITIONERS HAD THE INTENT TO DEFRAUD.

To obtain convictions of Dula for the crimes alleged in counts 11, 12, 13, 19, 25, and 29, wire fraud under 18 U.S.C. § 1341, the government was required to prove beyond a reasonable doubt that Dula used or aided and abetted the use of the wires in furtherance of a scheme to defraud. United States v. Shively, 927

F.2d 804 (5th Cir.), cert. denied, 111 S. Ct. 2806 (1991) (to obtain mail fraud conviction, government must prove scheme or artifice to defraud, specific intent to defraud, and use of mails for purpose of executing scheme); United States v. Shaw, 555 F.2d 1295 (5th Cir. 1977) (same; wire fraud). However, a review of the record reveals that with regard to these allegations, the government failed to present sufficient proof of any specific intent to defraud on the part of Dula at any time prior to the use of the wires. At best, the government showed only that orders were placed with Accra-bond by telephone or FAX machine, and that following these orders a decision may have been made in a particular case to substitute an alternative product made by another manufacturer in lieu of the precise product ordered. Even assuming

that the government demonstrated that there was fraud involved in these transactions, which the Petitioners strongly deny, the government's proof does not show that the intent to defraud preceded the use of the wires, as is required for a violation of 18 U.S.C. § 1343. See United States v. Pecora, 693 F.2d 421 (5th Cir. 1982) (the use of the wires must be intended to execute a scheme to defraud).

Moreover, the government's evidence did not demonstrate beyond a reasonable doubt that substitutions of one product for another were in fact made, for the representatives of the manufacturers who testified could not state with any assurance that they received anything other than what they had ordered from Accrabond. Thus, the element of fraud was not

shown with regard to the facts demonstrated by the government.

Even if the government did in fact demonstrate that alternative products were provided, however, this would not suffice to prove any fraudulent scheme. To be convicted of wire fraud, a defendant must not only intend to defraud or deceive, but he must also intend for some harm to result from his deceit. United States v. St. Gelais, 952 F.2d 90 (5th Cir. 1992). As Mary Lee's testimony indicated, the facts support the conclusion that if substitutions were made, Accrabond could have made these substitutions in good faith with the intention of providing an equal product to that which was ordered. Therefore, even when considering the facts in a light most favorable to the government's position, a finding

of wire fraud on these counts is not permissible.

IV. THE TRIAL COURT ERRED IN RULING THAT THE WEIGHT OF THE EVIDENCE SUPPORTED THE CONVICTIONS.

Following the jury verdict in this case, defense counsel submitted a motion for new trial based in part on the argument that the guilty verdicts were against the weight of the evidence. This motion was denied by the district court. While a trial judge is given considerable discretion in determining whether to grant a new trial in the interests of justice, he may not abuse his authority by denying a motion for new trial when it is clearly appropriate. United States v. Morales, 902 F.2d 604 (7th Cir.), amended, 910 F.2d 467 (7th Cir. 1990) (reversing trial court's denial of motion for new trial based on the conclusion

that the weight of the evidence at trial did not support the defendant's conviction).

In this case, the government's proof was so weak concerning the existence of an intent to defraud that it simply cannot be said that the weight of the evidence supported the convictions of Accrabond and Dula. Rather, the witnesses who testified that there was some sort of scheme to defraud at Accrabond were all persons who had conflicts with Dula or who had some monetary stake in the outcome of the case. These inherently untrustworthy witnesses were simply too unreliable to support a criminal conviction, particularly in light of the fact that none of the manufacturers' representatives who testified could state that they had received any products with deficiencies which could be attributed to the

substitution of inferior products. From the perspective of Dula and Accrabond, the policy of Accrabond was to provide its customers with quality products within the time required. The facts at trial showed that if alternative products were selected, these products were of the same quality as those ordered and performed in the same manner.

Therefore, a close review of the record in this case indicates that the trial court abused its discretion by declining to find that, based on the entirety of the evidence, the convictions were not supported by the weight of the evidence.

CONCLUSION

For all of the foregoing reasons, the Petitioners, Landen Max Dula and Accra-bond Corporation, request this Court to grant their Petition for Writ of Certi-orari.

Respectfully submitted,

Steven E. Farese
Counsel of Record

Anthony L. Farese
Farese, Farese & Farese
Post Office Box 98
Ashland, Mississippi 38603
(601) 224-6211

Attorneys for the Petitioners

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1992

UNITED STATES OF AMERICA,

Respondent,

v.

LANDEN MAX DULA and
ACCRABOND CORPORATION,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

Steven E. Farese
Counsel of Record
Anthony L. Farese
Farese, Farese & Farese
Post Office Box 98
Ashland, Mississippi 38603
(601) 224-6211

Attorneys for the Petitioners

TABLE OF CONTENTS

	Page
OPINION OF THE FIFTH CIRCUIT . . .	A-1

U.S. Court of Appeals
FILED
April 16, 1993
RICHARD E. WINDHORST, JR.
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7131

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LANDEN MAX DULA and ACCRABOND CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Mississippi

---

Before KING and EMILIO M. GARZA, Circuit Judges, and HALL,* District Judge.

SAM B. HALL, JR., District Judge:

Landen Max Dula and Accrabond Corporation were convicted by a jury of wire fraud, mail fraud, and false statements. Defendants now appeal their convictions, alleging a Brady violation, a comment on the failure of Dula to testify, and a violation of Fed. R. Evid. 404(b). Defendants also allege that the evidence was insufficient to prove Dula's intent to defraud, and that the trial court erred in denying a motion for new trial because the verdict was against the weight of the evidence. As the Brady claim is not presented in the record, it is dismissed without prejudice to the defendants' right to raise it in an action

---

*District Judge of the Eastern District of Texas, sitting by designation.

under 28 U.S.C. § 2255. As to all other issues, we find no error, and affirm.

I. FACTS AND PROCEDURAL HISTORY

Landen Max Dula is the founder and president of Accrabond Corporation, which is engaged in the sale of industrial sealants, adhesives, coatings, and other chemical products for military, government, and commercial aerospace use. Accrabond manufactured its own line of products, and distributed products of other manufacturers.

On May 16, 1991, Dula and Accrabond were indicted in the Northern District of Mississippi on charges of wire fraud, mail fraud, and false statements. The 32 count indictment charged that between January 1988 and September 1989, the defendants devised a scheme to defraud and obtain money under false pretenses by representing that products sold and sup-

plied conformed to the purchaser's specifications when they did not. Defendants were also charged with fraudulently substituting falsely identified and nonconforming products,[2] relabeling stale, outdated, and expired products as fresh, recently acquired products with extended shelf life,[3] coloring, thinning, and altering the appearance of products to conform to the appearance of other products and substituting the[m] for other prod-

---

[2]Many aerospace products carry manufacturer's lot numbers to provide a mechanism for a manufacturer to trace and recall defective lots. Accrabond provided its own lot numbers, or purchased small quantities of a product in order to obtain an authentic lot number.

[3]Most aerospace products such as those sold by Accrabond carry a shelf life, beyond which they must be retested to determine whether they still meet the standards of performance prescribed by military specifications.

ucts,[4] and using false labels, shipping documents, and certificates of compliance to conceal the fraudulent substitution of products.[5]

The indictment alleged eighteen instances of the use of interstate wire communications in violation of 18 U.S.C. §§ 2, 1343, and one of the mail in violation of 18 U.S.C. §§ 2, 1341 in execution

---

[4]Any alteration of a product after manufacture, such as thinning, dying, etc. may also change performance, and therefore also requires retesting to determine if the product still meets the military specifications.

[5]Most of Accrabond's business was conducted by telephone or fax transmissions, which were then entered into a computer, which generated a sales order and a manufacturing order. The order form also had a space for entering "blind notes," which were used to instruct Accrabond employees on what substitute to send for the product ordered, or what substitute had been supplied to the customer on a previous order. The documents sent to the customer, however, all described the product ordered, and did not reveal that a substitute had been supplied.

of a scheme to defraud thirteen aerospace and defense supply companies.[6] The indictment further charged the defendants with thirteen counts of falsely certifying products for use in defense contracts in violation of 18 U.S.C. §§ 2, 1001.

After a ten day jury trial in December, 1991, Accrabond was convicted on all but one count of wire fraud, and Dula was convicted on six counts of wire fraud and five counts of false statements. On February 18, 1992, Accrabond was sentenced to pay a fine of $248,000, and restitution in the amount of $8,238.32. Dula was sentenced to a term of imprisonment of thirty-six months on each count, to be

---

[6]The defendants were charged with illegally using wire communications when accepting telephone purchase orders from various customers. Further, the defendants allegedly submitted false statements or entries by supplying fraudulent certificates of compliance indicating that a particular product conformed to a particular military specification.

served concurrently, as well as a fine of $27,500. The defendants filed a notice of appeal February 24, 1992, from the judgments entered by U.S. District Judge Neal B. Biggers, Jr., and the court stayed execution of the judgment pending appeal.

II. ANALYSIS

A. BRADY VIOLATION

Defendants contend that the government violated the disclosure requirements of Brady v. Maryland, 373 U.S. 83 (1963), by failing to reveal test results showing that the product sold by Accrabond performed as well as was required.[7] Defend-

---

[7]In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that the due process clause requires the government to disclose all information that is favorable to the accused and is material to either guilt or punishment. See generally 3 Wright, Federal Practice and Procedure: Criminal 2d, § 557.2 (1982). The rule covers impeachment as well as exculpatory evidence. See Giglio v. United States, 405

ants claim that the government was in possession of numerous reports of such tests, which it failed to disclose despite repeated requests prior to trial. Specifically, Defendants pointed to inspection and testing done by Martin-Marietta, as stated by a company spokesman the day after the convictions. See Northeast Mississippi Daily Journal, Sunday, December 15, 1991. Defendants allege that this violation prejudiced them by denying them exculpatory materials in trial preparation and presentation, and by permitting the prosecutor to make false statements in closing argument regarding the impossibility of inspecting the products supplied by Accrabond.[8]

U.S. 150, 154 (1972).

[8]In closing argument, counsel for the Defendants argued that while the government had alleged that faulty products sold by Accrabond had endangered the performance of weapons such as the cruise

The government argues that it has not violated the requirements of Brady since the information was equally available to the Defendants,[9] and the information is not material.[10] We decline to

---

missile, the demonstration of the effectiveness of our country's military technology in the Persian Gulf War, including missiles made with materials sold by Accrabond, showed that the products were not deficient. (Tr. 1755). In response, the prosecutor stated in rebuttal that only an inspection of the materials could have revealed what problems there might have been with Accrabond products, and asserted that such an inspection would have been impossible. (Tr. 1775-1776).

[9]["]Brady does not oblige the Government to provide defendants with evidence that they could obtain from other sources by exercising reasonable diligence. [. . .] When evidence is available equally to the defense and the prosecution, the defendants must bear the responsibility for their failure to diligently seek its discovery." See, e.g., United States v. McKenzie, 768 F.2d 602, 608 (5th Cir. 1985), cert. denied, 474 U.S. 1086 (1986) [citation omitted].

[10]A defendant must establish that withheld evidence favorable to the accused is "material" in order to succeed on a Brady claim. See United States v. Ellender, 947 F.2d 748, 756 (5th Cir.

address these arguments at this time because, as indicated by oral argument, there is no evidence in the record concerning the test results that the government is alleged to have withheld in violation of Brady. In the absence of a record, we cannot fairly evaluate the merits of the defendants' claim. We therefore dismiss the defendants' Brady

---

1991). Suppressed evidence is material only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985).

In this case, the government argues that whether or not some of Accrabond's products were not fraudulent or nonconforming was not at issue, and is in fact irrelevant. Rather, the issue was whether the products were falsely represented and certified. See, e.g., United States v. Grimm, 568 F.2d 1136, 1138 (5th Cir. 1978) (evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant); United States v. Marrero, 904 F.2d 251, 260-261 (5th Cir. 1990), reh. denied, 909 F.2d 1479, cert. denied, 498 U.S. 1000.

claim without prejudice to their right to raise the issue in a proceeding under 28 U.S.C. § 2255.[11] See 3 Wright, Federal Practice and Procedure: Criminal 2d § 594 p. 453.

B. COMMENT ON DULA'S FAILURE TO TESTIFY

Dula also contends that the trial court erred when it denied a motion for mistrial following a statement by the prosecutor in closing argument that it[s] claims called the jury's attention to the fact that the [sic] Dula had elected not to testify. Dula argues that the failure of the trial court to declare a mistrial,

---

[11]This is similar to our procedure for ineffective assistance of counsel claim. Where such claims are not raised before the trial court, they cannot be resolved on direct appeal since the district court has had no opportunity to develop the record as to the merits of the allegations. See, e.g., United States v. Higdon, 832 F.2d 312, 313-314 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988); United States v. Bounds, 943 F.2d 541 (5th Cir. 1991).

or at least give a curative instruction, denied him his Fifth Amendment rights.

The Fifth Amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify. Griffin v. California, 380 U.S. 609 (1965); United States v. Borchardt, 809 F.2d 1115 (5th Cir. 1987). In deciding whether a comment made by the government in its closing argument is a comment on the defendant's failure to testify, a court must determine if "the prosecutor's manifest intention was to comment on the accused's failure to testify [or] was . . . of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." United States v. Smith, 890 F.2d 711, 717 (5th Cir. 1989).

However, the comments complained of must be viewed within the context of the

trial in which they are made. United States v. Bright, 630 F.2d 804, 826 (5th Cir. 1980). In this case, one of the defenses set forth by Dula and Accrabond was that the prosecution was instigated and directed by a rival, Products Research Chemical Corporation (PRC), to carry out the "corporate murder" of Accrabond in order to take over its market. Against this background, Government counsel stated in closing argument:

> Well, let me talk about PRC just a minute. There's been nobody on this witness stand that really knows about what happened between PRC and Accrabond Corporation.

(Tr. 1784). The government argues that the context makes clear that the intent of the argument was not to comment on Dula's failure to testify, but to make the point that none of the witnesses who had testified about the existence of a

lawsuit by PRC against Accrabond actually knew anything about it.

It is not error to comment on the defendant's failure to produce evidence on a phase of the defense upon which he seeks to rely. See, e.g., United States v. Bright, 630 F.2d 804, 825 (5th Cir. 1980). Thus, the government's argument to the jury that "no one has given you any reasonable explanation" in response to the defendant's contentions is not error. See United States v. Warren, 550 F.2d 219, 227 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978).

In any case, the district court's instructions to the jury emphasized that the defendant need not testify, and that no inference could be drawn from his failure to testify. (Tr. 1082). Therefore, even if there was harm created by counsel's comments, it was offset by the

court's instructions. See, e.g., United States v. Smith, 890 F.2d 711, 716 (5th Cir. 1989).

C. VIOLATION OF FED. R. EVID. 404(B)

Defendants next contend that the trial court violated Fed. R. Evid. 404(b)[12] by permitting the introduction of testimony concerning an alleged prior bad act of Dula and Accrabond which was not charged in the indictment. During the trial, the government elicited tes-

---

[12]Federal Rule of Evidence 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

timony regarding a sale of materials by Accrabond to Pan Metals, a Korean corporation. Rick Drexler, a former laboratory manager at Accrabond, told the jury that Pan Metals had ordered a Dow Corning adhesive, but had been sent a substitute product, which "did not get by" Pan Metals. (Tr. 969-971). This transaction was not among those alleged in the indictment.

This Court has set forth a two-part test for determining the propriety of admitting evidence of "bad acts" not alleged in the indictment. United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978), reh. granted, 563 F.2d 1782, opinion superseded, 582 F.2d 898, cert. denied, 440 U.S. 920 (1979). First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character.

Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403.[13] Id.

Evidence of an uncharged offense arising out of the same transaction or series of transactions as the charged offense is not an "extrinsic" offense within the meaning of Rule 404(b), and is therefore not barred by the rule. See, e.g., United States v. Simpson, 709 F.2d 903, 907 (5th Cir. 1983), cert. denied, 464 U.S. 942. The defendants were charged with conducting a continuing

---

[13]Federal Rule of Evidence 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

scheme to defraud, characterized by the substitution of products, and it was necessary for the government to prove that the defendants had intentionally devised a scheme and artifice to defraud. In developing proof of intent and motive, the prosecution may offer all of the surrounding circumstances that were relevant. See, e.g., United States v. Mancuso, 444 F.2d 691, 695 (5th Cir. 1971) (other transactions connected with the offenses charged have long been used to show a general pattern, the necessary criminal intent, or the guilty knowledge of the defendant).

In this case, the existence of a scheme to defraud is an element of the offense of wire fraud under 18 U.S.C. § 1343. Although Pan Metals' order was not one of those charged in the indictment, it was relevant to the existence of a

scheme and therefore was independently admissible as direct proof of the scheme charged. United States v. Santagata, 924 F.2d 391, 393-394 (1st Cir. 1991). In addition, the admission of the testimony did not violate Rule 403, which allows a trial judge to exclude probative evidence that is substantially outweighed by its prejudicial effect. The balancing of probative value against prejudicial effect is committed to the sound discretion of the trial judge, a decision that is final in the absence of abuse of discretion. United States v. Maceo, 947 F.2d 1191 (5th Cir. 1991) (citations omitted). We find no such abuse here.

D. SUFFICIENCY OF THE EVIDENCE OF DULA'S INTENT TO DEFRAUD

Dula also argues that a review of the trial demonstrates that the government failed to establish its wire fraud allegations because it introduced no evi-

dence that the use of the wires was preceded by an intent to defraud.

To obtain Dula's convictions for crimes of wire fraud alleged in the indictment, the government was required to prove beyond a reasonable doubt that he aided and abetted the use of the wires in furtherance of a scheme to defraud. United States v. Shively, 927 F.2d 804 (5th Cir. 1991), cert. denied sub nom. Johnson v. United States, 111 S.Ct. 2806 (to obtain mail fraud conviction, government must prove scheme or artifice to defraud, specific intent to defraud, and use of mails for purpose of executing scheme); United States v. Shaw, 555 F.2d 1295 (5th Cir. 1977) (same elements as to wire fraud). Dula argues that the proof adduced by the Government at trial that the orders were taken by phone, and following these orders a decision may have

been made to substitute an alternative product, is inadequate.

The above proof is sufficient, even standing alone, because the sequence and timing of the phone calls is immaterial. Once membership in a scheme to defraud is established, a knowing participant is liable for any wire communication which subsequently takes place or which previously took place in connection with the scheme. See United States v. Westbo, 746 F.2d 1022, 1025 (5th Cir. 1984). The crime of wire fraud did not terminate with the telephone call, and acts occurring after the use of the wires can be evidence "from which a jury could infer participation of the scheme to defraud." Id.; see also United States v. McDonald, 837 F.2d 1287, 1293 (5th Cir. 1988) (intent can be proven by the scheme to de-

fraud, and may be inferred from other facts).

E. VERDICT AGAINST THE WEIGHT OF THE EVIDENCE

Finally, appellants contend that the trial court abused its discretion by denying a motion for new trial which asserted that the weight of the evidence supported the defendants' acquittal.

The decision to grant or deny a motion for new trial based on the weight of the evidence is within the sound discretion of the trial court. An appellate court may reverse only if it finds the decision to be a "clear abuse of discretion." United States v. Martinez, 763 F.2d 1297, 1312 (11th Cir. 1985). Where the defense has had an opportunity to question witnesses as to their biases, and the jury has concluded that the witnesses are credible, the trial court has broad discretion. "It is the sole prov-

ince of the jury, and not within the power of this Court, to weigh conflicting evidence and evaluate the credibility of witnesses." United States v. Ivey, 949 F.2d 759, 767 (5th Cir. 1991), cert. denied sub nom. Wallace v. United States, 113 S.Ct. 64 (1992). "This court's review does not encompass weighing the evidence or judging the credibility of witnesses. . . . [This court] must affirm the conviction if a rational jury could have found the essential elements of the crimes beyond a reasonable doubt." United States v. Thorn, 917 F.2d 170, 173 (5th Cir. 1990).

Defendants argue that the Government's witnesses were not credible witnesses because they were disgruntled former employees of the defendants. However, as stated above, that credibility determination is best left for the jury.

The district court did not abuse its discretion in accepting the jury's assessment of the credibility of the witnesses and denying a motion for new trial on the ground that the verdict was against the weight of the evidence.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgments of the district court, but DISMISS the defendants' Brady claims, without prejudice to their right to raise them in an action under 28 U.S.C. § 2255.